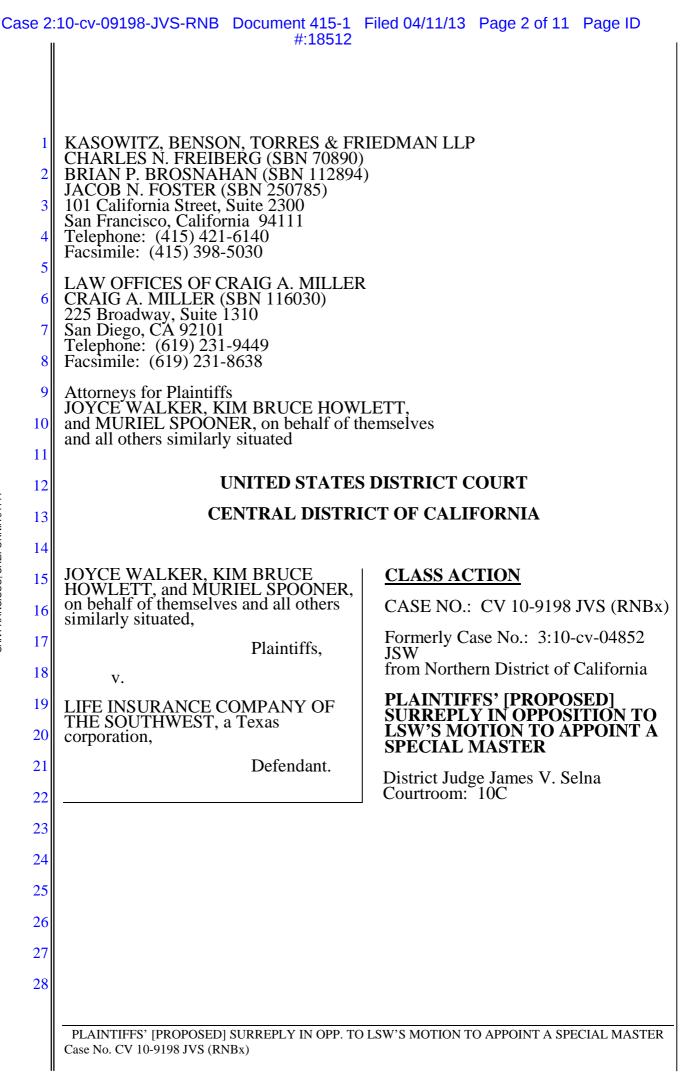
EXHIBIT 1



KASOWITZ, BENSON, TORRES & FRIEDMAN LLP 101 CALIFORNA STREET, SUITE 2300 SAN FRANCISCO, CALIFORNIA 94111

I. 1

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LSW'S SEVENTH AMENDMENT ARGUMENT IS UNAVAILING

In its Reply, LSW argues for the first time that undertaking the special 2 master process after trial of common issues but before trial of individual issues 3 would run afoul of the Seventh Amendment. See Reply at 7 n.9 (citing new 4 authority). Putting aside the fact that introducing this argument for the first time 5 on reply is improper, LSW is simply wrong in its statement of the applicable rule 6 under the Seventh Amendment. 7

LSW asserts that "[a]ll liability issues have to be determined by the same 8 jury" (Reply at 7 n.9), but this misstates the standard, which turns on whether a 9 second jury will be tasked with reexamination of the same issues that were decided 10 by the first jury. Id.; In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) ("[T]he judge must not divide issues between separate trials in such a way 12 that the same issue is reexamined by different juries.").¹ Assuming that LSW has a 13 right to a jury trial on individual issues, there would be no infringement of Seventh 14 Amendment rights here because those issues would not have been decided by the 15 jury deciding common issues. Charles Alan Wright, et al., Fed. Prac. & Proc. § 16 1801 (3d ed. 2012); see also Arthur Young & Co. v. U.S. Dist. Ct., 549 F.2d 686, 17 697 (9th Cir. 1977) (bifurcating individual issues from trial of common issues does 18 not violate Seventh Amendment rights). 19

As discussed in Kendrick v. Standard Fire Ins. Co., 2010 U.S. Dist. LEXIS 20 135694, at *33-34 (E.D. Ky. Sept. 30, 2010), 21

[T]hat any true factual disputes will arise in conjunction with class membership, and that any such disputes will go expressly to liability, is anything but certain. . . . But if such genuine factual disputes were to occur, a violation of Defendants' Seventh Amendment rights is not

¹ In *Rhone-Poulenc*, cited by LSW, the court found that reexamination would occur where the first jury would determine defendants' negligence (but not liability), and subsequent juries would determine issues such as comparative negligence, which overlapped with and would require reexamination of the issue of defendants' negligence. 51 F.3d at 1303. No such overlap or reexamination would occur here. 26 27 28

PLAINTIFFS' [PROPOSED] SURREPLY IN OPP. TO LSW'S MOTION TO APPOINT A SPECIAL MASTER Case No. CV 10-9198 JVS (RNBx)

automatic. Specifically, the right protects dividing issues between separate trials in a way that prompts reexamination of the same essential issue by separate juries.

If LSW has any right to present individual defenses (e.g., that a particular 4 person did not rely on the illustration), it can present such evidence to a second jury after the determination of common issues. The second jury will not be asked 6 to reexamine common issues decided by the first jury. For example, a presumption 7 of reliance will arise from common proof of materiality in the first trial; if LSW is entitled to try to rebut that presumption as to particular individuals, that will have no effect on any common issues decided by the first jury.

LSW MISSTATES PLAINTIFFS' POSITION REGARDING THE II. SPECIAL MASTER

12 LSW contends that Plaintiffs' "new proposal" is to have the special master 13 adjudicate liability issues, and that adjudication of liability issues exceeds the 14 scope of a master's authority under Rule 56. Reply at 6 & n. 8. But Plaintiffs have 15 never suggested that the special master should adjudicate liability issues. Plaintiffs 16 have consistently noted that proof of *class membership* could be determined with 17 the assistance of a special master after trial of the common issues. Plaintiffs' 18 Submission Regarding Identification of Class Members (Dkt. 339) at 10-12; 19 [Proposed] Reply to LSW's Substitute Supplemental Memorandum (Dkt. 348-1) at 20 13-14. Plaintiffs also have consistently taken the position that to the extent LSW 21 possesses defenses, such as lack of reliance, to the claims of individual 22 policyholders (as to which, thus far, LSW has put forward little if any evidence), 23 such issues can be deferred until after resolution of the common issues. Plaintiffs have not suggested the use of a special master to adjudicate such issues. 24 25 LSW MISSTATES PLAINTIFFS' ARGUMENT REGARDING ONE III. WAY INTERVENTION 26

27 LSW contends that Plaintiffs "suggest the one-way intervention rule does not apply to subclasses." Reply at 4 n. 5. But Plaintiffs do not make that assertion. 28

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A policyholder who is both a class and subclass member and who does not opt out 1 2 will be bound by the adjudicated results in this case. This Court has already held that there is no possibility for one-way intervention in the context of this case 3 because class and subclass claims "are premised on the same factual predicate, and 4 5 as such, would be barred from re-litigation." Class Certification Op. (Dkt. 353) at 6 34-35 (citations omitted). Any policyholder who does not opt out is either (1) a 7 member of the subclass and thus bound by the results in this case or (2) not a 8 member of the subclass and thus cannot assert any claims belonging to the 9 subclass.

IV. THERE IS NO NEED TO MEET AND CONFER ABOUT THE COURT'S PRIOR ORDER

11 LSW's opening brief sought to have the Court instruct the special master in 12 numerous matters, some of which are directly contrary to the Court's ruling on 13 class certification. After Plaintiffs briefed the many ways in which LSW's 14 proposed order departs from the Court's order, LSW on reply did not defend its 15 proposed order and stated simply that it is willing to meet and confer regarding the 16 instructions for the special master. Reply at 13-14. While Plaintiffs agree that, if 17 the Court decides to appoint the special master at this time, there are many issues 18 relating to the special master that should be the subject of meet and confer (and 19 Plaintiffs so stated in their Opposition Brief at page 25 & note 5), the issues 20 requiring meet and confer *do not include* the instructions already set forth in the 21 Court's Class Certification Order (see Opposition Brief at 19-24). While Plaintiffs 22 do not believe that there is any need to meet and confer on any special master 23 issues until after trial on the common issues, because a special master will be 24 unnecessary if LSW prevails, any eventual meet and confer discussions should be 25 limited to logistical and procedural matters pertaining to the special master's 26 appointment (e.g., cost) and should not involve the procedures that the Court 27 already determined will guide class membership determinations. Any order

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regarding appointment of a special master should make clear that the Court's prior
 instructions remain in place and are not subject to reexamination via "meet and
 confer."

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V. LSW MISSTATES THE LAW AND CONFUSES THE RECORD WITH RESPECT TO ITS RETENTION OF ILLUSTRATIONS AND OTHER DOCUMENTS

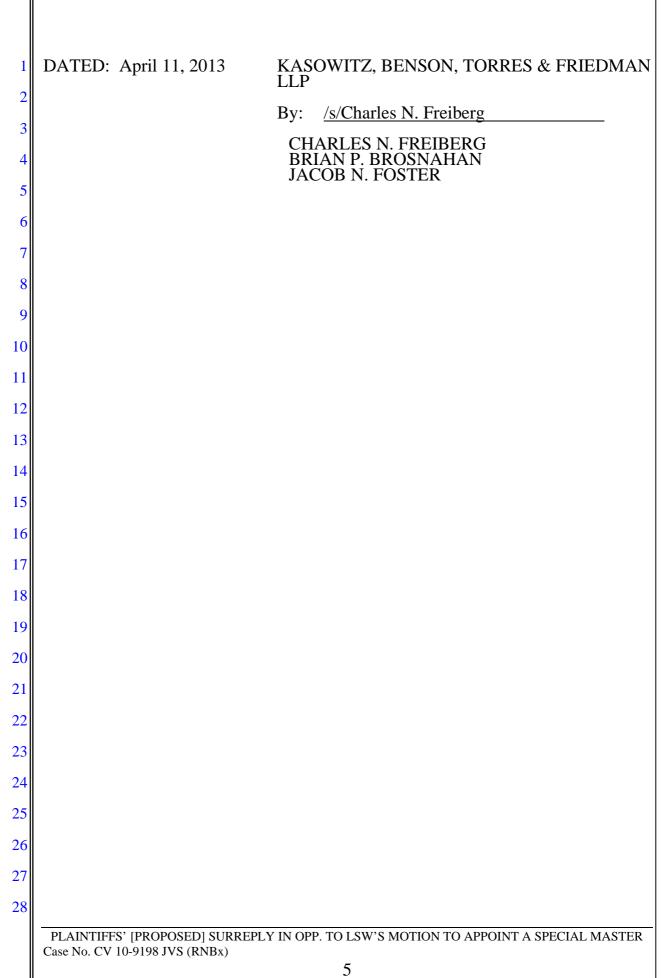
LSW asserts that the California Insurance Code requires only that LSW 6 retain the illustration that is sent with the policy. Reply at 8:7-9. This is false. 7 8 The regulation is not limited to illustrations that are sent with the policy but 9 includes any signed illustration of the policy as applied for or as issued. See Cal. Ins. Code § 10509.958(a)-(d). Second, LSW also asserts, incorrectly citing this 10 Court's Class Certification Order (at 31), that LSW's own policies "do[] not 11 12 require this information either." Reply at 8:14-21. In fact, LSW's own policies require submission of an Agent's Report indicating whether a sales illustration was 13 used. See Declaration of Victoria McDonald (Dkt. 262) ¶8. 14

VI. <u>CONTRARY TO LSW'S ASSERTION, MR. HOWLETT AND MS.</u> <u>SPOONER DID NOT LOSE THEIR POLICY APPLICATIONS.</u>

16 LSW, relying on a single November 2, 2009 email, advances the assertion 17 that "Mr. Howlett and Ms. Spooner lost their applications, not long after 18 purchasing the policy," which LSW cites as a "perfect example of the difficulties 19 that policyholders will experience in trying to determining their own subclass 20 membership." Reply at 11:9-12 (citing Fleming Dec., Ex. A). As other documents 21 produced in discovery confirm, however, Mr. Howlett and Ms. Spooner did not 22 lose their applications, but only needed some time to find them. See Declaration of 23 Charles N. Freiberg in Support of Surreply, Ex. A. The very next day, on 24 November 3, 2009, Mr. Howlett faxed copies of their "life insurance applications" 25 to Steve Burgess. Id. That it took one day for Mr. Howlett to locate these 26 documents hardly exemplifies any "difficulty" policyholders will face.

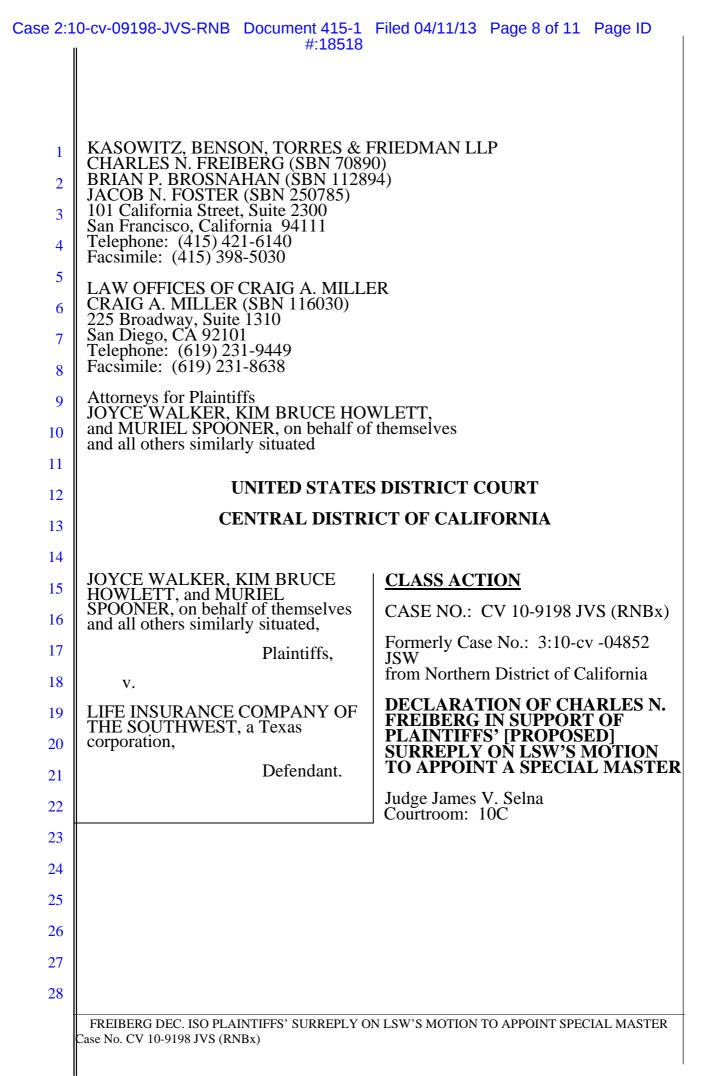
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KASOWITZ, BENSON, TORRES & FRIEDMAN LLP 101 CALFORNIA STREET, SUITE 2300 SAN FRANCISCO, CALIFORNIA 94111 I am an attorney authorized to practice in the courts of California and
 in the United States District Court for the Central District of California. I am a
 partner of Kasowitz, Benson, Torres & Friedman, LLP, counsel for Plaintiffs in
 these proceedings. I have personal knowledge of the facts stated herein and if
 required could and would testify under oath thereto.

6 2. Attached hereto as Exhibit A is a true and correct copy of an email
7 from Steve Burgess to Kim Howlett discussing the fax transmittal of "life
8 insurance applications," dated November 3, 2009.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 11th day of April, 2013 at San Francisco, California.

> By: <u>/s/ Charles N. Freiberg</u> Charles N. Freiberg

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP 101 CALIFORNIA STREET, SUITE 2300 SAN FRANCISCO, CALIFORNIA 94111 FREIBERG DEC. ISO PLAINTIFFS' SURREPLY ON LSW'S MOTION TO APPOINT SPECIAL MASTER Case No. CV 10-9198 JVS (RNBx) Case 2:10-cv-09198-JVS-RNB Document 415-1 Filed 04/11/13 Page 10 of 11 Page ID #:18520

EXHIBIT A

Case 2:1	L0-cv-09198-JVS-RNB Document 415-1 Filed 04/11/13 Page 11 of 11 Page ID	
	#:18521	
From:	Steve Burgess <sburgess@cflid.com></sburgess@cflid.com>	
Sent:	Tuesday, November 3, 2009 3:06 PM	
To:	Howlett, Kim <khowlett@pbsj.com></khowlett@pbsj.com>	
Subject:	RE: Your life insurance dispute	

Yes I will and I did receive them.

Thx!

From: Howlett, Kim [mailto:KHowlett@pbsj.com] Sent: Tuesday, November 03, 2009 2:08 PM To: Steve Burgess Subject: RE: Your life insurance dispute

Steve:

Could you send along an email to me regarding maintaining the confidentiality of the life insurance applications I just faxed to you.

Much Thanks Kim

Mr. Kim B. Howlett

Associate Vice President/Senior Group Manager PBS&J direct 858-514-1018

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